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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

IMPERIAL ASSET MANAGEMENT, LLC,

Plaintiff, Cross-Defendant and
Respondent,

v.

MATTHEWS LAND, INC.,

Defendant, Cross-Complainant and
Appellant;

WESTMOUNT PROPERTIES, LLC,

Cross-Defendant and Respondent.

D054440

(Super. Ct. No. ECU04177)

APPEAL from a judgment and an order of the Superior Court of Imperial County,
Joseph W. Zimmerman, Judge. Judgment reversed in part; affirmed in part. Order
reversed in part; affirmed in part.

This appeal concerns a purchase agreement with respect to one of three large
parcels of land in Imperial County which appellant acquired in 2006 in a series of related

transactions. According to appellant, respondent seller allegedly agreed to pursue its efforts to obtain development rights for the parcels, including the parcel which is the subject of this appeal. Under the terms of the purchase agreement, respondent seller received a note and deed of trust, which following close of escrow on the transaction respondent seller assigned to the other respondent.

Appellant was not satisfied with the progress being made in acquiring development rights on the parcel and, among other matters, stopped making payments on the note it had given respondent seller. Respondent assignee then initiated a receivership proceeding in which it eventually was able to foreclose on the deed of trust.

In the receivership proceeding appellant filed a cross-complaint against both the seller and the assignee and alleged claims for breach of contract, breach of fiduciary duty, and rescission. The seller and the assignee filed demurrers to an amended version of the cross-complaint, which the trial court sustained without leave to amend. The trial court also awarded respondents their attorney fees. We reverse in part and affirm in part.

We reverse with respect to appellant's breach of contract and breach of fiduciary duty claims against the seller. The purchase agreement contains a statement which could reasonably be interpreted as obligating the seller to use its best efforts to obtain development entitlements for the parcel. Appellant's cross-complaint further alleges the seller failed to diligently pursue the entitlements. Arguably, the statement in the purchase agreement would also support the conclusion that the seller would be acting as appellant's agent with respect to the entitlement application process. Thus the cross-complaint alleges causes of action against the seller for both breach of contract and breach of

fiduciary duty. Because we reverse with respect to the breach of contract and breach of fiduciary duty claims against the seller, we also reverse the trial court's award of attorney fees to the seller.

We affirm as to the rescission claims. Appellant cannot establish either a mutual mistake of fact or a failure of consideration. As we interpret the purchase agreement, although the seller may have obligated itself to attempt to obtain the development rights appellant would need in order to proceed with its plans for the property, seller made no representation or guaranty as to whether or when it would be able to obtain those rights.

We also affirm the order awarding the assignee its attorney fees.

FACTUAL AND PROCEDURAL HISTORY

The second amended cross-complaint (SACC) filed by appellant Matthews Land, Inc. (Matthews), was the subject of respondents Imperial Asset Management, LLC's (Imperial), and Westmount Properties, LLC's (Westmount), successful demurrers. The SACC includes by incorporation a number of transactional documents as well as factual allegations. Under well-established procedural principles, we, like the trial court, accept the factual allegations of the cross-complaint as true and indulge all reasonable inferences supported by the allegations, including what may be reasonably inferred from the documents incorporated by reference. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) " [I]t is error for a . . . court to sustain a demurrer when the plaintiff has stated a cause of action under any possible theory.' [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810, quoting *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

In summary, the SACC alleges: In 2005 Matthews and Westmount entered into a purchase agreement under which Matthews agreed to purchase a parcel of land near Calexico for \$62 million. Initially, Matthews agreed to pay \$45 million in cash and give Westmount a note secured by a deed of trust in the amount of \$17 million. At the time Matthews and Westmount entered into the purchase agreement, Westmount did not own the parcel but had a contract under which it had the right to acquire the parcel. Also, at the time of the purchase agreement Westmount had commenced an effort to obtain approval of a tentative subdivision map for the parcel and its annexation into Calexico. With respect to Westmount's efforts to obtain approval of a tentative map, the purchase agreement, which was attached to the SACC and incorporated by reference, expressly provided: "Buyer understands and agrees that (a) Seller does not presently own the Land but is under contract to purchase the Land (b) Seller is pursuing and will continue to diligently pursue during the term of this Agreement the entitlement of the Land (the 'Property Entitlement'), all as has been previously described to Buyer, subject to change in accordance with the final Subdivision Map for the Land, (c) the Property Entitlement that Seller has submitted to the City of [Calexico]¹ and other governmental entities for approval consists of the proposal for the Tentative Map With Conditions of Approval, and (d) on the Entitlement Date, only the Tentative Map With Conditions of Approval will have been approved but a final Subdivision Map satisfying all the requirements of the California Subdivision Map Act will not have been approved." In turn, the purchase

¹ Although the original purchase agreement referred to the City of El Centro, by amendment, the reference was later changed to the City of Calexico.

agreement defined the term "Entitlement Date" as follows: "The date on which the City of [Calexico] and other relevant governmental entities shall make a final non-appealable determination approving the Tentative Map with Conditions of Approval in respect of the Property Entitlement and shall have annexed the Property in to the City of [Calexico]."²

Importantly, although the purchase agreement set forth the parties' understanding Westmount would pursue approval of a tentative subdivision map during the term of the agreement, the agreement contained extensive provisions disclaiming any representations or warranties on Westmount's part with respect to the parcel's zoning or current or future development rights. Paragraph 11.1 of the agreement stated in pertinent part: "Except as expressly set forth in this Agreement, it is understood and agreed that Seller and Seller's agents have not at any time made and are not now making, and they specifically disclaim, any warranties, representations or guaranties of any kind or character, express or implied, with respect to the Property, including, but not limited to, warranties, representations or guaranties as to . . . (8) zoning or building entitlements to which the Property or any portion thereof may be subject . . . , (13) the condition or use of the Property or compliance of the Property with any or all past, present or future federal, state or local ordinances, rules, regulations or laws, building, fire or zoning ordinances, codes or other

² In a separate purchase agreement entered into shortly after it entered into the purchase agreement which is the subject of this appeal. Matthews acquired Westmount's rights to a second parcel of land. Although Matthews initially made claims with respect to the second parcel, it voluntarily dismissed those claims. Matthews acquired a third parcel of Imperial County land from a third party.

similar laws . . . , (16) the potential or development of the Property, (17) the merchantability of the Property or fitness of the Property for any particular purpose"

Paragraph 11.2 further provided: "**Sale 'As Is, Where Is.'** Buyer acknowledges and agrees that upon any Closing, Seller shall sell and convey to Buyer and Buyer shall accept the Property '**AS IS, WHERE IS, WITH ALL FAULTS,**' except to the extent expressly provided otherwise in this Agreement and any document executed by Seller and delivered to Buyer at Closing Except as expressly set forth in this Agreement. Buyer has not relied and will not rely on, and Seller has not made and is not liable for or bound by, any express or implied warranties, guarantees, statements, representations or information pertaining to the Property or relating thereto."

Paragraph 11.2.2, restated the fact that the sale was "as is" and "where-is" and that the buyer waived all warranties not expressly set forth in the agreement: "INCLUDING, BUT NOT LIMITED TO, (i) WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, (ii) WARRANTIES WITH RESPECT TO THE CONDITION OF THE PROPERTY, ITS COMPLIANCE WITH ANY ZONING OR OTHER RULES, REGULATIONS, LAW, OR STATUTES APPLICABLE TO THE PROPERTY, (iii) WARRANTIES WITH RESPECT TO THE USES PERMITTED ON, THE DEVELOPMENT REQUIREMENTS FOR, OR ANY OTHER MATTER OR THING RELATING TO THE PROPERTY OR ANY PORTION THEREOF, INCLUDING WITHOUT LIMITATION . . . THE ECONOMIC OR OTHER RETURN THAT MAY BE DERIVED FROM OWNERSHIP, DEVELOPMENT, IMPROVEMENT OR USE OF THE PROPERTY."

Of some importance here, the final sentence of paragraph 11.2.2 stated: "IF ANY FACTS, CONDITIONS OR CIRCUMSTANCES CHANGE OR TURN OUT DIFFERENTLY FROM WHAT BUYER BELIEVED (UNLESS BUYER SO BELIEVED BASED UPON AN EXPRESS REPRESENTATION OR WARRANTY OF SELLER AS SET FORTH IN THIS AGREEMENT[]), BUYER'S OBLIGATIONS HEREUNDER SHALL REMAIN IN FULL FORCE AND EFFECT WITH NO RIGHT OR REMEDY AGAINST SELLER WITH RESPECT THERETO NOR ANY RIGHT TO DELAY BUYER'S PERFORMANCE HEREUNDER OR TO TERMINATE THIS AGREEMENT."

Also of some significance, the purchase agreement and each of three written amendments to the purchase agreement contained integration clauses which provided in substantially the following form: "This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings relating to the Property. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. All exhibits hereto are incorporated herein by this reference for all purposes."

The SACC alleged that under the express terms of the purchase agreement and oral understandings reached by the parties, Westmount agreed to become Matthews's agent for purposes of obtaining the entitlements needed for the property. The SACC alleged Westmount had breached this obligation both by failing to diligently pursue the entitlements and by processing entitlement applications of competing developers. The SACC alleged Matthews had given Westmount notice of its default under the terms of the

purchase agreement on August 17, 2007, and that thereafter Westmount had assigned the note and deed of trust to Imperial. The SACC alleged that Imperial was aware at the time it acquired the note and deed of trust that Matthews believed Westmount was in default on its obligations under in the purchase agreement.

In addition, notwithstanding the disclaimers which appear in the purchase agreement, according to the SACC at the time Matthews and Westmount entered into the agreement the parties believed that only one year was needed to complete "the entitlement of the property" and "the parties believed and confirmed with City Manager, Marlene D. Best, that the City of Calexico would pay the cost of constructing the sewer plant that would serve the property and that the sewer plant would be located within one half mile of the property." The SACC further alleged Matthews was induced to enter into the purchase agreement by its belief that the entitlement process would take one year and that the City of Calexico would finance a sewer project adjacent to the property. The SACC alleged that in August 2007 Mathews discovered those conditions would not occur.

The SACC alleged the failure of Westmount to fully perform its obligation to obtain the needed entitlements, the failure of the parties to complete the entitlement process within a year, and the failure of the City of Calexico to make good on its commitment to finance the sewer plant, supported causes of action for breach of contract, breach of fiduciary duty and rescission of the purchase agreement. The SACC named both Westmount and Imperial as cross-defendants. The SACC alleged Westmount was

liable on all three causes of action, and that Imperial was liable for rescission and breach of contract.

Matthews filed the SACC in response to a receivership and breach of contract action Imperial had initiated in January 2008 in an effort to foreclose on the deed of trust it had received from Westmount. Imperial had commenced the action because Matthews had failed to make payments due on the note Imperial had acquired from Westmount and had sent Westmount a notice of its intent to rescind the purchase agreement.

After appointment of a receiver, Imperial completed a nonjudicial foreclosure on its deed of trust, and on September 16, 2008, the trial court entered an order approving the receiver's final accounting and discharging the receiver. Thereafter Westmount and Imperial filed their demurrers to the SACC.

With respect to the breach of contract cause of action, Westmount demurred only to the extent the breach of contract cause of action was based on the allegation Matthews assisted competitors in their efforts to obtain development entitlements. Westmount's demurrer did not contest the allegation that it had failed to diligently process Matthews's entitlement application. The trial court sustained both Westmount's and Imperial's demurrers without leave to amend.

Westmount's counsel prepared a judgment which dismissed the cross-complaint in its entirety and the trial court promptly entered the judgment. The trial court awarded Westmount \$121,000 in attorney fees and costs and Imperial was awarded \$270,000 in fees and costs. After the trial court made its award of attorney fees, Imperial dismissed

its underlying complaint, including its remaining breach of contract claims. Matthews filed a timely notice of appeal.

DISCUSSION

I

First, we take up Matthews's contention the SACC states a valid claim for breach of contract against Westmount. As we have noted, the purchase agreement states the parties' understanding that during the term of the agreement Westmount would "diligently" pursue an application for a tentative subdivision map for the property. This express provision of the purchase agreement could reasonably be interpreted as obligating Westmount to use its best efforts to obtain the needed approval. Such best efforts obligations have been readily recognized as creating enforceable contractual rights, particularly in the context of land development disputes. (See e.g. *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 273-275 [under purchase agreement vendor of land obligated to use best efforts to obtain tentative vesting subdivision map].) Moreover, on a demurrer Westmount was in no position to dispute Matthews's allegation that Westmount had not diligently pursued the tentative map.

Rather than reaching Matthews's contentions on the merits, Westmount contends on appeal Matthews forfeited its right to pursue its allegation that Westmount failed to diligently pursue the tentative map. Westmount relies on the fact that its demurrer did not challenge Matthews's allegation that Westmount had failed to diligently pursue the entitlement; instead, by its terms, Westmount's demurrer only challenged the breach of contract claim "to the extent it is based on a purported breach of the duty of loyalty."

Thus neither Westmount nor Matthews litigated the question of whether Westmount had a duty to diligently pursue the tentative map and whether the SACC adequately alleged a breach of that duty. Westmount argues Matthews cannot raise that theory of liability on appeal because following the trial court's order sustaining Westmount's demurrer without leave to amend, the trial court entered an order dismissing the SACC in its entirety, rather than permitting, as it should have, the unlitigated lack of diligence claim to survive. Relying on the holding in *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 285, Westmount contends that in failing to bring to the trial court's attention the fact the judgment of dismissal was broader than Westmount's demurrer and hence broader than the trial court's order sustaining the demurrer, Matthews forfeited its right to assert a lack of diligence theory on appeal. We are unwilling to find a forfeiture on this record.

As Matthews points out, the judgment which dismissed the entire action was submitted to the trial court by Westmount's counsel and signed by the trial court before Matthews had an opportunity to review it and object to it. Thus, Matthews's only opportunity to bring the overbreadth of the judgment to the trial court's attention was by way of a post-judgment motion to vacate filed before Matthews was required to file a notice of appeal and thereby divest the trial court of jurisdiction over the case. (See Code Civ. Proc., § 916 subd. (a).) This single post-judgment opportunity to object to the form of the judgment was in marked contrast to the multiple opportunities which appellant in *Shaw v. County of Santa Cruz* had to either insist that all its claims in the bifurcated proceeding be litigated or to object to the dismissal of the unlitigated claims. Moreover, the forfeiture rule is not required in cases, such as this, where the new theory asserted by

the litigant is solely a matter of law. (See *Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 525 ["We determine de novo whether the complaint states facts sufficient to state a cause of action"].) " 'As a general rule, a new theory may not be presented for the first time on appeal unless it raises only a question of law and can be decided on undisputed facts.' [Citations.] When the facts are not disputed, the effect or legal significance of those facts is a question of law. [Citation.] A question of law is not automatically subject to the doctrine of forfeiture. [Citations.]" (*In re V.F.* (2007) 157 Cal.App.4th 962, 968.)

In sum then, the SACC states a cause of action for breach of contract against Westmount and Matthews has not lost the right to assert that claim. Thus we must reverse the judgment insofar as it dismisses the breach of contract cause of action against Westmount.

II

We also reverse with respect to Matthews's breach of fiduciary duty claim. Matthews argues that in agreeing to continue to process the entitlement application, Westmount effectively agreed to act as Matthews's agent and hence, as an agent, assumed fiduciary duties toward Matthews. We agree with Matthews that for purposes of defeating a demurrer the allegations of the cross-complaint are sufficient to allege the existence of a fiduciary relationship.

"A fiduciary relationship is 'any relation existing between parties to a transaction wherein one of the parties is . . . duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed

by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A fiduciary relation in law is ordinarily synonymous with a confidential relation." ' [Citations.]

"In the commercial context, traditional examples of fiduciary relationships include those of trustee/beneficiary, corporate directors and majority shareholders, business partners, joint adventurers, and agent/principal. [Citation.] 'Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors.' [Citation.]" (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 613-614.)

In agreeing to continue pursuit of development entitlements for the property it was selling to Matthews, Westmount was plainly assuming duties which went beyond the typical duties a commercial vendor owes the purchaser of real property. While on remand Westmount may be able to demonstrate that its additional obligations were limited to ministerial functions or financial obligations such that no fiduciary obligation would arise, nothing on the face of the purchase agreement or in any other part of the record expressly or implicitly places such limits on Westmount's obligation to obtain a tentative map. Indeed on remand, for its part, Matthews may well be able to demonstrate that the duty of obtaining a discretionary development permit from a municipality involved negotiation with third parties and access to confidential information which are the hallmarks of a fiduciary relationship. Nothing in the record or common experience

forecloses Matthews's ability to make such a showing. Thus Matthews has alleged a possible fiduciary theory upon which relief might eventually be granted. (See *Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at p. 810.) Hence the trial court erred in sustaining the demurrer as to Matthews's breach of fiduciary duty claim.

Because the judgment in favor of Westmount must be reversed, the order awarding Westmount its attorney fees, which was predicated on the trial court's determination that Westmount was the prevailing party, must also be reversed.

III

Next, we turn briefly to Matthews's breach of contract claim against Imperial. As against Imperial, the SACC alleged Imperial is liable for breach of contract because at the time Imperial initiated the foreclosure proceedings Matthews had the right to rescind the purchase agreement and its obligations under the purchase agreement was excused. As we explain more fully below, Matthews's performance of its obligations was not excused by virtue of any of the allegations in the SACC. Hence the trial court properly sustained the demurrer with respect to Matthews's breach of contract claim against Imperial.

IV

The SACC alleges Matthews is entitled to rescind the purchase agreement because of mutual mistakes of fact and failure of consideration. We agree with Westmount and Imperial that the SACC does not allege any valid rescission claim.

As Imperial notes, "to the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."

(*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) With respect to Matthews's allegations that there were mutual mistakes of fact, this principle is of some importance. As we have noted, Matthews alleges that, at the time the Matthews and Westmount entered into the purchase agreement, the parties mistakenly believed the tentative map would be approved within one year and the City of Callexico would finance construction of a sewage treatment plant near the property. We must disregard these allegations because they are categorically inconsistent with the extensive disclaimers of warranty and representations set forth on the face of the purchase agreement attached to the cross-complaint as an exhibit, in particular the "as is, where is" disclaimer in paragraph 11.2.2 of the agreement and the integration clauses which were part of the purchase agreement and each of its amendments. By its terms the purchase agreement disclaimed any representation, warranty or understanding that did not appear on the face of the agreement and there is in fact no representation, warranty or understanding in the purchase agreement with respect to the time in which the tentative map would be approved or the financing and location of the sewage treatment plant. Thus there is no basis upon which Matthews can contend that the purchase agreement was entered into as the result of a mutual mistake.

Matthews's allegation there was a failure of consideration is also defective. While we have found that Matthews has alleged a valid claim for breach of contract, in the context of a real property transaction in which a deed to the property which is the subject of transaction has been conveyed, the breach of any covenant which survived the conveyance will not support a rescission claim unless performance of the covenant was

made a condition subsequent. (See *Schultz v. County of Contra Costa* (1984) 157 Cal.App.3d 242, 247; *Norby v. Pister* (1952) 114 Cal.App.2d 510, 511, 512.)

In *Norby v. Pister* plaintiff buyer purchased property from defendant seller and the defendant seller promised in an escrow agreement to install domestic pipe lines to the property. Following the close of escrow on the property, the seller was unable to install the required domestic pipe lines. In finding plaintiff was not entitled to rescind the escrow agreement, the court stated: " 'It is settled that a deed without fraud in its inception conveys the title, and is not void for any failure of consideration, either in whole or in part. [Citation.] Acts done subsequent to the execution and delivery of a deed cannot effect its integrity, and a subsequent failure of consideration or breach of a personal covenant not amounting to a condition, will not avoid the deed, if there was no fraud or false representation. [Citations.] Section 1689 of the Civil Code providing for the rescission of contracts for failure of consideration is without application to an executed conveyance' " (*Ibid.*) "Where, as here, the installation of the pipe lines

was not made a condition of transfer of title, plaintiff's remedy, if any, was an action for damages for breach of contract." (*Ibid.*)³

The same is true here: Matthews paid in cash for the property and with a note and received title to the property long before either party expected to receive any entitlements from Callexico. As in *Norby v. Pister*, Matthews's remedy for failure to properly pursue the entitlements was an action for damages.

Matthews's contention that the fact that it purchased Westmount's rights to acquire the property from a third party, rather than title to the property itself, is of no material consequence. As a result of, and as contemplated by the purchase agreement, Matthews received title to the property and itself conveyed a deed of trust to Westmount. Both the grant deed Matthews received and the deed of trust it conveyed to Westmount were material parts of the consideration for the transaction, and under the rule set forth in *Norby v. Pister* both were protected from rescission for any breach of a covenant not made a condition of the transfers.

³ Another way of articulating the rule discussed in *Norby v. Pister* is in terms of dependent and independent covenants. "The question, whether acts stipulated for are such as that the performance of them is a condition precedent to the right to enforce performance by the other party to a contract, is to be solved, not by any technical rules, but by ascertaining, if possible, the intention of the parties. When a covenant or promise only goes to part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise The intention of the parties is to be discovered rather from the order of time in which the acts are to be done, than from the structure of the instrument or the arrangement of the covenants.' 'The payment of money cannot be made dependent on the performance by the other party of a condition which, by the very terms of the contract, is not to be performed, or may not be performed until after the date at which the money is to be paid' " (*Starr v. Davis* (1930) 105 Cal.App. 632, 635.)

In sum, the trial court properly sustained without leave Westmount's and Imperial's demurrers to the rescission cause of action.

V

As we indicated above, following entry of the order dismissing the cross-complaint, the trial court awarded Imperial \$270,000 in attorney fees and costs and thereafter Imperial dismissed its original contract claims against Matthews. On appeal Matthews argues the attorney fee award is defective because it was entered before Imperial dismissed its contract claims against Matthews, because the award violated the anti-deficiency provisions of Code of Civil Procedure section 580d, and because in a number of respects the amount awarded was unreasonable. We find no error or abuse of discretion in the award which warrants reversal.

1. *Premature Award*

Matthews argues the trial court had no power to make an attorney fees award until Imperial had dismissed its original complaint. We agree "[t]he prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu v Abbata* (1995) 9 Cal.4th 863, 876.) As the court in *Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15, explained, this rule is born out of the practical reality that until all contract claims are resolved there is "no losing or winning party" and hence the trial court is in no position to determine which party prevailed on the contract. Here of course it was clear the litigation with Imperial was effectively over when Matthews's cross-complaint was dismissed, that Imperial had

prevailed, and disposition of Imperial's remaining contract claims was simply a ministerial matter of filing a voluntary dismissal. Under these circumstances, any error the trial court committed in making the award before the dismissal was filed was not prejudicial and plainly was cured when Imperial's dismissal was filed.

2. Code of Civil Procedure Section 580d

Next, Matthews contends that because, during the pendency of the lawsuit, Imperial employed nonjudicial foreclosure, it should not have been awarded attorney fees incurred in its receivership proceeding, but that its fees should have been limited to the amounts incurred in successfully obtaining dismissal of Matthews's cross-complaint. Matthews argues that the receivership fees were barred by the anti-deficiency provisions of Code of Civil Procedure section 580d. We find no error.

First, as Imperial points out, the trial court expressly denied Imperial any fees related to either its abandoned judicial foreclosure claim or its successful nonjudicial foreclosure. Secondly, the fees Imperial incurred in the receivership proceeding were not barred by the anti-deficiency because they were part of Imperial's effort to protect against Matthews's attempt to rescind the purchase agreement and the underlying note. As such they were not subject to Code of Civil Procedure section 580d. (See *Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1509.)

3. Reasonable Fees

" It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own

expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.]" (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096.)

The trial court found that most of Imperial's counsel's work was performed at its Los Angeles offices and that given the complexity of the issues, Imperial was justified in retaining out-of-town counsel. Contrary to Matthews's argument, this finding is supported by the ample record in this case and the substantial interests at stake. Thus the trial court properly granted Imperial's request that it be paid counsel's Los Angeles hourly rate, rather than the rate earned in Imperial County. (See *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1242-1243.)

The trial court also found the case "involved very significant claims relating to complicated agreements, factual allegations and questions of law, and very significant amounts of money; as such, the time incurred by counsel in defense of this matter and otherwise in connection with the claims made by Matthews Land was reasonable under the circumstances of this case." Again, contrary to Matthews's argument, the trial court's finding is also fully supported by the ample record in this case and in particular the billing records submitted by Imperial in support of its motion.

In short, there are no grounds upon which we may disturb the trial court's award of attorney fees to Imperial.

DISPOSITION

The judgment is reversed insofar as it dismisses the breach of contract and breach of fiduciary duty causes of action against Westmount; in all other respects the judgment is affirmed. The order awarding attorney fees is reversed insofar as it awards Westmount its attorney fees; in all other respects the award of attorney fees is affirmed.

Matthews to recover its costs of appeal from Westmount; Imperial to recover its costs of appeal from Matthews.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.